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In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-6193

JOSEPH EVERETT BROWN and THOMAS DEAN SMITH,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (App. 243-246) is reported at 452 F. 2d 868.

JURISDICTION

The judgment of the court of appeals (App. 247) was entered on December 20, 1971. Pursuant to an order extending the time to file a petition for a writ of certiorari, the petition was filed on February 17, 1972. Certiorari was granted on June 26, 1972

(App. 249). 408 U.S. 922. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether defendants charged with transportation of stolen merchandise and conspiracy have standing to challenge the lawfulness of the seizure of the stolen merchandise from the custody and premises of a co-conspirator to whom they had delivered the goods.

2. Whether the court of appeals properly held that, in view of the other independent evidence establishing petitioners' guilt, the erroneous admission at trial of testimony concerning declarations by each petitioner in part implicating the other petitioner, in violation of *Bruton* v. *United States*, 391 U.S. 123, was harmless beyond a reasonable doubt.

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment of the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT

After a jury trial in the United States District Court for the Eastern District of Kentucky, peti-

tioners were convicted of having conspired to steal, transport in interstate commerce, and conceal merchandise worth more than $5,000, knowing the merchandise was stolen, and of having committed the substantive offense of transporting the merchandise from Ohio to Kentucky with knowledge that it was stolen, in violation of 18 U.S.C. 371 and 2314 respectively. Each was sentenced to concurrent prison terms of five years. The court of appeals affirmed (App. 243-246).[1]

1. The indictment alleged that beginning on or about June 12, 1970, and continuing until about August 28, 1970, petitioners had conspired to steal merchandise in Cincinnati, Ohio, and transport it for delivery to co-defendant Knuckles in Manchester, Kentucky (App. 8-10). Petitioners were arrested in the course of stealing merchandise in Cincinnati on August 28 (App. 50, 119-120). Prior to trial, petitioners and co-defendant Knuckles moved to suppress other stolen merchandise which had been seized during a search of Knuckles' General Dollar Store in Manchester, Kentucky, on August 29, 1970 (App. 23, 49, 60, 85). At the hearings on the motion (App. 11-117), the merchandise was identified as belonging to the Central Jobbing Company of Cincinnati, Ohio; it had been delivered to Knuckles by petitioners on prior occasions (App. 50). The seizure was made in the course of a search of the store, conducted pur-

[1] A third defendant, Clinton Knuckles, was joined in the conspiracy count and was named alone in a separate count charging receiving and concealing stolen merchandise, in violation of 18 U.S.C. 2315. The charges against him were severed for separate trial (App. 243).

suant to a warrant (App. 12-16). Knuckles was on the premises at the time but petitioners, who were in custody in Ohio, were not (App. 39, 112-113). At the hearing, it was conceded by the government that the search warrant was invalid (App. 109); it had been signed in blank by the issuing Manchester City Police Judge, who failed to observe whether or not "there was anybody's name on that affidavit" and did not administer an oath to the affiant (App. 12-16).[2]

The district judge raised the standing issue himself (App. 34). There was never any question about Knuckles' standing since it was his store that was searched and he was present at the time. Petitioners argued that under the Fourth Amendment and under Rule 41(e), Fed. R. Crim. P., "any defendant against whom this evidence is to be used as prosecuting evidence has the standing to move to suppress," and "if one who has a standing to make the motion, makes the motion and it is successful in the courts, then any defendant against whom this testimony is to be used has * * * standing * * *" (App. 34, 35). For this proposition they cited *McDonald* v. *United States*, 335 U.S. 451 (App. 34, 35, 109-111). They alleged no proprietary interest in the premises searched or

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[2] The local judge testified at the hearing that he was called at home on Saturday, August 29, and told that a search warrant was needed. The call came, he testified, "as I was preparing to take my wife to the hospital. She was very seriously ill with asthma * * *" (App. 12). He was taken to meet with the County Attorney, and because "I was in a rush to get my wife to the hospital" he signed the warrant in blank (App. 18).

the goods seized.[4] Nor were they present at the store when the search took place (App. 39, 112-113). Counsel for petitioners argued in the alternative, however, that, under *Jones* v. *United States*, 362 U.S. 257, and *Simmons* v. *United States*, 390 U.S. 377, petitioners automatically had standing to challenge the seizure, since "possession" was an element of the offenses with which they were charged; they therefore "don't have to have possession at the time the unconstitutional search takes place" (App. 112), he urged.

The motion to suppress was granted as to Knuckles only (App. 116). In denying petitioners' motion for lack of standing, the district judge asked counsel rhetorically (App. 113):

> Well, what right of yours has been violated? You don't claim the property. You don't claim * * * the store. What right of these people has been violated? They were up in Cincinnati.

Evidence about the stolen merchandise seized from Knuckles' store was admitted at the trial; its retail value was shown to be in excess of $100,000.00 (App. 173). At no time had it been sold by its owner, the Central Jobbing Company, to Knuckles or to anyone else (App. 208-218).

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[4] At the trial it was brought out that on the evening of their arrest, August 28, prior to the search and seizure, both petitioners had given statements to the authorities indicating that they had sold the previously stolen merchandise to Knuckles for various amounts of cash (App. 131-135, 146-147).

2. Other evidence at the trial showed that, at the times in question, petitioners were employed by Central Jobbing Company ("Central"), a wholesaler of household goods and clothing which sold primarily to its own retail outlets in Ohio, Kentucky, and Virginia (Tr. 25-28).[4] Central's warehouse in Cincinnati was managed by petitioner Brown, who was entrusted with the keys to the building (Tr. 27-28); petitioner Smith was a truck driver for the company (Tr. 28). During 1968 and 1969, Central had experienced losses attributed to pilferage amounting to approximately $60,000 each year (Tr. 43). On August 18, 1970, William West, a buyer and supervisor for Central, found a slip of paper that he had seen drop from petitioner Brown's pocket. On the slip, in Brown's handwriting, was a list of warehouse merchandise, together with a price next to each item well below wholesale cost (App. 164-165). The total inventory listed and priced by Brown amounted to $2,200.00. West estimated that the lowest total wholesale price for these items would have been about $6,400.00, and that the total fair market price was about $10,000.00 (App. 164-169).

The Hamilton County police were promptly notified and set up a surveillance of the warehouse. Shortly after 4:00 p.m. on August 28, 1970, petitioners were observed wheeling carts containing boxes of merchandise from the warehouse to a U-Haul van; one of the officers took twenty photographs of petitioners

[4] "Tr." refers to the transcript of trial proceedings.

loading the merchandise onto the truck. It took about one hour to fill the van; petitioners then locked the warehouse, and drove off in the van. They had not gone far before they were stopped by the county police. Petitioners were placed under arrest, advised of their constitutional rights, and taken, with the loaded van, to police headquarters (App. 119-121, 152, 155-160).

The owner of a Humble service station in Cincinnati identified rental invoices showing that Brown had on two prior occasions (June 12 and 30, 1970) rented a U-Haul truck from him; the mileage on each truck when Brown returned it approximated the distance of a round trip from Cincinnati to Manchester, Kentucky (Tr. 145-149). Five witnesses from Manchester testified that, sometime in June 1970, they had seen petitioners late at night unloading boxes from a U-Haul truck and carrying them into Knuckles' store (Tr. 190-193, 209-214, 222-224, 233-236, 247-250).

3. Following their arrest, both petitioners, after being advised of their constitutional rights, made separate statements to Detective Hulgin of the Hamilton County Sheriff's Office.[4] At trial, these statements were introduced through the detective's testimony (App. 118-156).

a. No objection was made to that part of Hulgin's testimony dealing with the admissions by each peti-

[4] Petitioner Smith also made a statement to F.B.I. agent Whitley following his arrest on federal charges on September 1, 1970.

tioner which contained no inculpatory reference to the other. This included, for example, the following statements to the detective by petitioner Smith (App. 128-129, 134-135):

> Q. 41. And what did he say with regard to his participation or no participation on any occasion before between the 12th day of June, 1970, and the 28th day of * * * August, 1970, from Central Jobbers there in Cincinnati?
>
> A. In relation to that period of time, he stated that on several occasions he has removed some property from this warehouse. He did only specify one particular date, that would have been the 29th of June.
>
> Q. 42. 29th of June. And what sort of vehicle did he say that was used on this prior occasion or the several prior occasions?
>
> A. A U-Haul van truck.
>
> Q. 43. And did he say where he got the U-Haul van truck or who got it?
>
> A. He stated that the U-Haul van truck on most occasions was not rented by himself, but he did know where it came from.
>
> Q. 44. Where did he say the goods were taken from on these prior occasions?
>
> * * * * *
>
> A. The goods were taken from the warehouse of Central Jobbing Company.
>
> Q. 45. And did he say or state where the goods were taken, if anywhere?
>
> A. To a destination.
>
> Q. 46. Where was that?
>
> A. He stated they were taken to Manchester, Kentucky, to Knuckles Discount Store.

Q. 47. And did he state what times during the day that he removed these goods from the warehouse on these previous occasions?

A. He stated it was usually after the warehouse closed, between 4:00 p.m. and 6:00 p.m., in that area.

* * * * *

Q. 66. Now, did you during this interview ask him how much money was received from the selling of this merchandise to the Knuckles Store?

* * * * *

A. He said of that money on one occasion he received $600.00 and on the other occasion he received $800.00.[6]

Similarly, Hulgin testified without objection to the following inculpatory admissions by petitioner Brown (App. 146-147):

A. * * * I asked him if he has ever been involved in removing any other property from the Central Jobbing Warehouse on any other occasion other than that particular day. His reply was that yes, he had been involved in the past. I asked him if he could specify any particular dates when this may have occurred or any one he may have been in the company with at this time. He indicated to me that you should know. That's approximately his words, "You should know all about it by now." I asked him again if he would care to specify more particularly.

[6] F.B.I. agent Whitley testified that, after being advised of his rights, Smith admitted to him his involvement in the theft, transportation, and sale of the merchandise (App. 220-221).

He stated, "Yes." He said he didn't recall the exact dates, but that * * * at least two other occasions he did remove truck loads of merchandise from the warehouse. I asked him where he had taken this merchandise to. He stated he had taken it to Knuckles Discount Store in Manchester, Kentucky.

* * * * *

Q. 142. Did the defendant, Joseph Everette Brown, tell—did he indicate to you how these goods were taken to Manchester when he was participating?

A. Yes. He stated that they had been removed in U-Haul trucks.

* * * * *

Q. 144. And where did he take these goods on these occasions? Did he say that?

A. Yes. He stated the goods were transported to Knuckles Discount Store in Manchester, Kentucky.

Q. 145. Did he relate to you as to how much he had received for these goods which he had taken on these two occasions?

A. No, sir, he did not specify particular amounts of money other than the fact that he did receive money.

b. Objections were interposed, however, under *Bruton* v. *United States*, 391 U.S. 123, to those portions of testimony by Hulgin and by F.B.I. agent Whitley that referred to statements of one petitioner, made out of the presence of the other, which implicated the other in the crimes charged. The trial

judge overruled the objections[7] (App. 124-126, 129-130, 134-135, 137, 138, 220-222), and this testimony which consisted mainly of statements by Smith implicating Brown, was admitted into evidence.[8] The

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[7] The decision of the trial judge was based on his reading of the Sixth Circuit's decision in *Campbell* v. *United States*, 415 F. 2d 356, as holding that *Bruton* did not apply in conspiracy cases (App. 124). A motion by the defense for a severance of the conspiracy count was denied as untimely (App. 125-127).

[8] Agent Whitley testified that after he had advised Smith of his constitutional rights (App. 220-221):

> Mr. Smith stated that prior to his employment at Riverville, Ohio, he had been employed as a warehouseman at Central Jobbing Company in Cincinnati. He stated during June 1970, another individual, who was also employed at Central Jobbing Company, one Joe Brown, had approached him and asked him to help steal merchandise from Central Jobbing Company and help him transport this merchandise to Manchester, Kentucky. He advised me that during June of 1970, he and Joe Brown made two trips to Manchester, Kentucky, with merchandise consisting of household goods and clothing which they had stolen from Central Jobbing Company. He recalled that to the best of his knowledge that these dates were June 5th and 29th, 1970. He said that he and Mr. Brown had received approximately one-half the value of the stolen merchandise from the owners of the * * * Knuckles Discount Store in Manchester, Kentucky, and that the owners of the Discount Store knew that the merchandise was stolen. Mr. Smith stated further that he had received approximately $2,500.00 as his share of the money which they had received from the stolen merchandise.

Detective Hulgin related essentially the same information (App. 129, 134-136, 142-143), adding that Smith had also stated that the list, which was found by West at the warehouse, had been prepared and shown to him by Brown, and that the total price of $2,200.00 shown on the list was the amount of

jury was repeatedly admonished by the court that such cross-inculpatory statements were only relevant to the conspiracy count (count 1) and were not to be considered in connection with the substantive count (count 2) against the non-declarant defendant (App. 134-135, 137-139, 141-142, 147, 220, 228).

4. The jury found petitioners guilty on both counts, and their convictions were affirmed by the court of appeals (App. 243-246).

On the question of petitioners' standing to move to suppress the evidence seized in Knuckles' store, the court below ruled that the district court had properly denied the suppression motion as to petitioners, because they could claim no possessory or proprietary interest in the goods seized or the premises searched; nor could they, under *Alderman* v. *United States*, 394 U.S. 165, assert the Fourth Amendment rights of Knuckles (App. 245).

The court also held that the district court had violated *Bruton* in admitting those portions of each petitioner's confession which contained inculpatory references to the other.* It held, however, that the

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money that petitioners were to receive for that particular shipment to Knuckles (App. 139-142).

Hulgin further testified that he was told by petitioner Brown that on the two previous occasions when he delivered stolen goods to Knuckles he had been accompanied by Smith (App. 146).

* The court concluded that the trial judge misinterpreted its decision in *Campbell* v. *United States*, 415 F. 2d 356 (C.A. 6), holding "that admission of statements which fall within the co-conspirator exception to the hearsay rule does not deny

error was harmless beyond a reasonable doubt in view of the other independent evidence which overwhelmingly established proof of guilt (App. 246).

SUMMARY OF ARGUMENT

I

Petitioners, although not present at the time of a police search of someone else's store, assert that they should be accorded standing to object to that search because of an alleged possessory interest in the stolen merchandise that was seized. The courts below properly found that petitioners had no Fourth Amendment interest in either the premises searched or the property seized and therefore could not invoke the exclusionary rule.

A. As the Fourth Amendment decisions of this Court have consistently emphasized, the constitutional protection against unreasonable searches and seizures is intended to safeguard rights which are by nature personal, not vicarious or derivative. Consequently, for a defendant to establish that he has standing to move to suppress evidence, he must demonstrate that he was himself a victim of a search or seizure, that is, one against whom the search was directed, as distinguished from one who claims preju-

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the Sixth Amendment right of confrontation and cross-examination" (App. 246). Since petitioners' statements had been made while they were in custody, and were not in furtherance of the conspiracy, those portions with respect to which a *Bruton* objection had been interposed were, the court held, erroneously admitted into evidence (*ibid.*).

dice as a consequence of a search and seizure directed at someone else.

In the present case, the search was unquestionably "directed" only at co-conspirator Knuckles. Petitioners' argument to the contrary attempts to invoke principles of partnership and agency to establish some constructive interest of their own in the stolen merchandise seized from Knuckles' store. But such civil law concepts of property and partnership are not controlling for Fourth Amendment purposes. Moreover, the facts of this case do not support petitioners' "partnership" theory. The conspiracy count in the indictment, on which it is based, alleges that the so-called "partnership in crime," as petitioners have characterized it (Pet. Br. 10), had continued only "to and including the 28th day of August, 1970" (App. 8, 9), the day of petitioners' arrest in Ohio. The search and seizure took place the next day, after the scheme had been terminated by discovery and arrest. Furthermore, as each petitioner had confessed the night before the search, they had "sold" the previously stolen goods to Knuckles and had been paid in cash at the time of delivery two months prior to the seizure. It is thus apparent that the "partnership" argument advanced by petitioners as a basis for conferring standing has no foundation either in law or in fact.

But even if, under some legal fiction, petitioners could be deemed somehow to have had constructive possession of the stolen merchandise at the time that it was seized, their position on the standing question

would not be materially improved. Mere "possession" of property known to be *stolen* does not by itself give rise to a reasonable expectation of privacy sufficient to support a challenge to its seizure. It can reasonably be expected that efforts will be made by the authorities to apprehend the stolen goods from a wrongful possessor and return them to their rightful owner. So long as this is accomplished by a search and seizure that does not otherwise invade some legitimate constitutionally protected interest of the thief—such as his own person or property, or premises in which he has a sufficient Fourth Amendment interest—the values protected by the Fourth Amendment are not served by allowing him to invoke the exclusionary rule based solely on a claim of constructive "possession" of the property seized.

B. Petitioners also claim that, irrespective of the absence of any interference with their personal rights, they are automatically entitled to standing to challenge the search and seizure under *Jones* v. *United States*, 362 U.S. 257. Even assuming, however, that the substantive count of the indictment here—alleging that petitioners "did transport * * * [in interstate commerce] * * * stolen goods, wares and merchandise * * *" (App. 10)—charges a "possessory" offense within the meaning of *Jones*, the automatic-standing rule announced in that case cannot be extended to the situation presented here.

What primarily concerned the Court in *Jones* was that a defendant charged with the crime of unlawful possession of narcotics would, because he possessed

the narcotics "at the time of the search" (362 U.S. at 263), be confronted with "a special problem" (362 U.S. at 261), since to vindicate his Fourth Amendment rights on a motion to suppress he might have to admit his guilt of the offense charged. That "dilemma" has, however, essentially been eliminated by this Court's subsequent decision in *Simmons* v. *United States*, 390 U.S. 377, precluding the prosecution from using against a defendant as part of its case in chief the testimony he earlier gave on his suppression motion to establish his standing.

In light of *Simmons*, there is no reason to give petitioners the benefit of the *Jones* automatic-standing rule. Here, unlike *Jones*, the element of unlawful "possession" involved in the substantive offense relates to a time *prior to*, not contemporaneous with, the challenged search and seizure. Thus, even assuming, as did the Court in *Jones* (362 U.S. at 263), that petitioners had failed to "acknowledge interest" in the stolen goods for standing purposes, the government would here not "have the advantage of contradictory positions as a basis for conviction." There is simply no contradiction in obtaining the use of evidence on the ground that petitioners did not have a sufficient possessory interest at the time of the seizure, and thereafter asserting as part of the case in chief that petitioners were in possession of the seized property at some earlier time.

Moreover, even assuming "contemporaneous possession," as petitioners assert, this is not a case where, in the absence of an application of the *Jones*

automatic-standing rule, the government would be able to benefit from "contradictory assertions of power" (362 at 264). The "possession" in this case relates solely to *stolen* merchandise, in which petitioners have no legitimate Fourth Amendment interest. It is, therefore, not necessary for the government to refute such "possession" on the motion to suppress. It can, perfectly consistent with its position at trial, acknowledge petitioners' "possession" of the stolen property at the time that it was seized, but insist that petitioners demonstrate an invasion of some legitimate expectation of privacy on their part to establish standing to challenge that seizure. In this case petitioners have failed to establish that any legitimate expectation of privacy was violated.

II

Petitioners also seek to have their convictions overturned on the ground that certain statements made by each of them following arrest, which also implicated the other, were improperly admitted into evidence in violation of *Bruton* v. *United States*, 391 U.S. 123. The challenged statements were, however, merely cumulative of the other evidence properly before the jury—including petitioners' own confessions—which independently established "the classical open-and-shut case" against petitioners. Accordingly, the court below correctly concluded that the error of the district court in admitting the *Bruton* statements was in this instance harmless beyond a reasonable doubt.

ARGUMENT

I. PETITIONERS LACKED STANDING TO CHALLENGE THE SEIZURE OF THE STOLEN MERCHANDISE

A. Petitioners' Fourth Amendment Rights Were Not Implicated in the Search and Seizure They Sought to Challenge

1. Standing to raise Fourth Amendment claims is closely intertwined with the purposes and protections of the Fourth Amendment itself.[10] The Fourth Amendment establishes personal rights. It provides that the people shall be secure "in *their* persons, houses, papers, and effects, against unreasonable searches and seizures * * *" (emphasis added). As stated in *Katz* v. *United States*, 389 U.S. 347, 353, "the Fourth Amendment protects people—and not simply 'areas'—against unreasonable searches and seizures * * *." "[W]herever an individual * * *

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[10] This case presents in a slightly different context some of the Fourth Amendment issues that the Court declined to decide last Term in *Combs* v. *United States*, 408 U.S. 224, involving the standing of a defendant charged with a possessory offense to challenge a search for and seizure of stolen property located on the premises of a third party. *Combs* was remanded to the district court for further proceedings, since the standing issue had not been argued in the district court and it was apparently unclear from the record whether the court of appeals had considered the applicability of *Jones* v. *United States*, 362 U.S. 257, when the question was first raised on appeal. In our Memorandum responding to the certiorari petition in this case, we urged that action on the petition be deferred until *Combs* was decided. On the same date that the decision in *Combs* was announced, the Court granted certiorari in this case (App. 249).

[has] a reasonable 'expectation of privacy', * * * he is entitled to be free from unreasonable governmental intrusion." *Terry* v. *Ohio*, 392 U.S. 1, 9. Thus, this Court has held that an individual may be aggrieved by a search even though he is not present when it occurs if he has a sufficient interest in the premises where the search takes place to justify a "reasonable expectation of freedom from governmental intrusion." *Mancusi* v. *DeForte*, 392 U.S. 364, 368.

Because Fourth Amendment rights are personal, and cannot be vicarious or derivative, the inquiry for determining whether a person has standing under the Fourth Amendment to suppress evidence has consistently focused on whether the movant is a "victim" of the search. See *Alderman* v. *United States*, 394 U.S. 165, 173. As the Court has explained in *Jones* v. *United States*, *supra*, 362 U.S. at 261, in construing the language of Rule 41(e) of the Federal Rules of Criminal Procedure, which enforces the exclusionary rule formulated under the Fourth Amendment, "to qualify as a 'person aggrieved by an unlawful search and seizure' one must have been a victim of a search or seizure, one against whom the search was directed, as distinguished from one who claims prejudice only through the use of evidence gathered as a consequence of a search or seizure directed at someone else."

In the present case, the search was unquestionably "directed" only at Knuckles, not at petitioners. It took place in his store; petitioners have never asserted any ownership or other personal interest in

those premises. Only Knuckles was present at the time of the search and seizure; petitioners were by then already in custody in another state. And the property seized admittedly belonged to the Central Jobbing Company. In this context, petitioners can point to no aspect of the search and seizure that impinged upon *their* personal "expectation of privacy" under the Fourth Amendment.

2. In their brief, petitioners attempt to invoke principles of partnership and agency to establish some "interest in and to the partnership property which was unlawfully found and seized in Knuckles Store in Manchester, Kentucky" (Pet. Br. 11). There is no foundation either in law or in fact for resting standing on such a theory.[11]

This Court has made some references to "partnership" concepts in describing the relationship among co-conspirators. See, *e.g.*, *Fiswick* v. *United States*, 329 U.S. 211, 216; *Pinkerton* v. *United States*, 328 U.S. 640, 644; *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150; *United States* v. *Kissel*, 218 U.S.

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[11] This argument was not made in the courts below or in the petition for a writ of certiorari; it is therefore not properly before the Court. See *Lawn* v. *United States*, 355 U.S. 339, 362, n. 16. In fact, petitioners had conceded in the district court that "they had no possession" at the time of the search and seizure, but they contended that that was irrelevant (App. 112). See pp. 4-5, *supra*. Their primary contention was that if one defendant had standing to have evidence suppressed, each co-defendant automatically has standing to have the evidence suppressed as to himself as well: "His presence or absence, or his ownership or possession, or his lack of ownership or possession, would have nothing to do with it" (App. 111).

601, 608. But the illustrative use of such analogies does not provide a basis for invoking "the law pertaining to partnership property" (Pet. Br. 11) to sustain a claim of constructive possession for Fourth Amendment purposes. First, civil law concepts of property rights are not controlling for Fourth Amendment purposes. See, *e.g.*, *Katz* v. *United States*, *supra*, 389 U.S. at 352, 353; *Mancusi* v. *DeForte*, *supra*, 392 U.S. at 367-368. Second, even under traditional partnership law, "[i]t is a well-grounded principle that no partnership can exist for the accomplishment of an illegal purpose." Rowley, *Partnership: The Substantive Law* (2d ed. 1960) § 31.3, p. 601; and see Uniform Partnership Act, Sec. 31(3). Thus, the stolen merchandise involved here is no more "partnership property," in the sense urged by petitioners, than it is the personal property of any member of the conspiracy. See *United States* v. *Sacco*, 436 F.2d 780, 784 (C.A. 2), certiorari denied, 404 U.S. 834.[13]

Moreover, the facts of this case do not support petitioners' "partnership" theory. Contrary to their apparent argument, petitioners were not charged with possession of the stolen property at the time of the search and seizure, constructively attributed to them because it was seized from their "partner." On the

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[13] Even Knuckles, who was accorded standing to contest the search and seizure, was in no position to assert a proprietary interest in the goods seized; his claim of invasion of privacy rested instead on the unlawful intrusion on his premises, without his consent, and at a time when he was legitimately present (App. 34). See *Jones* v. *United States*, *supra*, 362 U.S. at 267.

contrary, the indictment alleged that both the conspiracy to steal and transport the property and the actual interstate transportation of it had continued only "to and including the 28th day of August, 1970" (App. 8, 9), the day of petitioners' arrest in Ohio. The search and seizure took place the next day, after the scheme had been terminated by discovery and arrest. The introduction of evidence about the discovery of stolen merchandise merely corroborated petitioners' confessions about their *prior* thefts and deliveries and the other independent evidence of those pre-seizure offenses. Nor is there any basis for asserting a lingering "partnership" interest in either the general store or the stolen merchandise Knuckles kept there. As each petitioner had confessed the night before the search, they had "sold" the previously stolen goods to Knuckles and had been paid in cash upon delivery two months prior to the seizure.[12]

3. The Court has already categorically rejected petitioners' closely related and more familiar argument (see n.11, *supra*) that if one defendant has standing, any co-defendant against whom the evidence is sought to be used can also have it suppressed. In disposing of this claim in *Wong Sun* v. *United*

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[12] As Judge Friendly observed in *United States* v. *Bozza*, 365 F. 2d 206, 223 (C.A. 2), the values sought to be protected by the Fourth Amendment are not served "by holding that a thief who has left evidence of his crime on the premises of a confederate is subrogated to the latter's right to complain of a search and seizure * * *."

States, 371 U.S. 471, 492, where the Court held that the suppression of heroin as to one co-conspirator did "not compel a like result with respect to Wong Sun," it was explained: "[t]he seizure of this heroin invaded no right of privacy of person or premises which would entitle Wong Sun to object to its use at his trial."[14] And this point was recently underscored in *Alderman* v. *United States*, 394 U.S. 165, where the Court, after reviewing its earlier decisions discussing the essential purposes underlying both the Fourth Amendment and the exclusionary rule formulated thereunder, held that defendants in the position of the present petitioners have no standing to challenge the use of evidence that may have been unlawfully seized from someone else. As there stated (394 U.S. at 171-172, 174; emphasis added):

> In *Mapp* [v. *Ohio*, 367 U.S. 643] and *Weeks* [v. *United States*, 232 U.S. 383], the defendant against whom the evidence was held to be inadmissible was the victim of the search. However, in the cases before us each petitioner demands retrial if any of the evidence used to convict him was the product of unauthorized surveillance, regardless of whose Fourth Amendment rights the surveillance violated. At the very least, it is urged that if evidence is inadmissible against one defendant or conspirator, because tainted by electronic surveillance illegal

[14] The Court explicitly distinguished *Jones*, *supra*, because in *Jones* the "person challenging the seizure of the evidence was lawfully on the premises at the time of the search." 371 U.S. at 492, n. 18.

as to him, it is also inadmissible against his co-defendant or coconspirator.

This expansive reading of the Fourth Amendment and of the exclusionary rule fashioned to enforce it is admittedly inconsistent with prior cases, and we reject it. The established principle is that suppression of the product of a Fourth Amendment violation can be successfully urged only by those whose rights were *violated by the search itself, not by those who are aggrieved solely by the introduction of damaging evidence.* Coconspirators and codefendants have been accorded no special standing.

* * * * *

We adhere to these cases and to the general rule that Fourth Amendment rights are personal rights which, like some constitutional rights, may not be vicariously asserted. * * * [15]

4. Even if, contrary to our argument, this Court accepts petitioners' "partnership theory" as a basis for recognizing that they had some "possessory" interest in the seized property, we submit that they still should not be accorded standing to invoke the exclusionary rule. It is our position that, consistent with the essential purpose of the Fourth Amendment to protect *personal* rights (*supra*, pp. 18-19), unless a defendant can point to an invasion by a search

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[15] The Court also noted in *Alderman* (394 U.S. at 173, n. 7) that *McDonald* v. *United States*, *supra*, on which petitioners placed partial reliance in the district court (see p. 4, *supra*), "is not authority to the contrary." See, also *United States* v. *Wells*, 437 F. 2d 1144, 1146 (C.A. 6); *United States* v. *Lopez*, 420 F. 2d 313, 316 (C.A. 2).

and seizure of some other constitutionally protected interest that is legitimately his own, mere "possession" of property known to be stolen does not alone give rise to a reasonable expectation of privacy sufficient to support a challenge to its seizure. Where persons claim constructive possession of *stolen* property, they cannot be said to have "a reasonable expectation of freedom from governmental intrusion" (*Mancusi* v. *DeForte*, *supra*, 392 U.S. at 368) with respect to that property, so as to make them "victims" of a search and seizure for "standing" purposes, when such property is seized from remote premises with respect to which they otherwise have no interest or legitimate expectation of privacy.[16] That, of course, is the situation here.[17]

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[16] The "reasonableness" of such an invasion of privacy would, of course, be a matter for determination once "standing" has been established; it would not bear on the threshold question of standing to move to suppress.

We note that this Court has indicated that, under the Fourth Amendment's flexible standard of reasonableness (see *Camara* v. *Municipal Court*, 387 U.S. 523, 534-539), searches for and seizures of stolen goods, where the government is entitled to recover the property, may require less justification than where personal effects are seized from their rightful owner. See *Davis* v. *United States*, 328 U.S. 582, 590-591; *Boyd* v. *United States*, 116 U.S. 616, 623-624.

[17] There may be some question whether one who claims that he innocently possessed the stolen property, not knowing it to be stolen, can be deemed to be a "victim" of a search and seizure for standing purposes. Since it is still stolen property, he plainly is in no better position to assert an actual possessory interest therein under the Fourth Amendment as his personal "effects." But perhaps it could be argued that, because he had no reason to know that the property was stolen, he should be

Our position on this point has substantial historical and constitutional support. Prior to this Court's formulation of the exclusionary rule under the Fourth Amendment,[18] the typical means of asserting a claim of invasion of privacy due to an interference with property rights by law enforcement officers was by way of a common law action of trespass or conversion for damages, or by replevin for return of the property. See, *e.g.*, *Entick* v. *Carrington*, 19 Howell St. Tr. 1029 (trespass action); *Banks* v. *Farwell*, 21 Pick. 156 (Mass.) (same); *Oviatt* v. *Pond*, 29 Conn. 479 (conversion action).[19] But recovery in such suits was premised on a showing by the plaintiff that he was, at the time of the wrongful intrusion, not only in possession of the property seized or injured, but also that he had some colorable claim of right to it. "No court ever has allowed an admitted, or even a clearly proved, thief without a claim of right to recover * * *." Prosser, *Torts* (4th ed. 1971) 94; and see *id.* at 78, n. 62.

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deemed to have had a legitimate expectation of privacy for standing purposes.

The question is not presented in this case since it was clearly established at the suppression hearing that these petitioners knew that the merchandise they transported to Knuckles store had been stolen from the Central Jobbing Company (App. 50).

[18] See, *e.g.*, *Boyd* v. *United States*, 116 U.S. 616; *Weeks* v. *United States*, 232 U.S. 383.

[19] At common law, the admissibility of evidence was not affected by the illegality of the means by which it was obtained. See *Adams* v. *New York*, 192 U.S. 585, 594-595; and see VIII Wigmore, *Evidence* (McNaughton rev. 1961) § 2183.

One in possession of stolen property should, we think, be in no better position under the exclusionary rule to assert a claim of invasion of privacy with respect to the seizure of that property than he is in an action to recover damages grounded on essentially the same claim. Cf. *Bivens* v. *Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388. This Court observed in *Jones*—in treating separately an aspect of the "standing" question not directly involved here (see n. 25, *infra*.)—that those whose presence on searched premises is "wrongful" cannot invoke the privacy of the premises as a basis for challenging the search thereof (362 U.S. at 267). See also *United States* v. *Cole*, 416 F.2d 827 (C.A. 6), certiorari denied, 397 U.S. 1027 (trespasser has no standing). Similarly, those whose possession of personal property is "wrongful", because the merchandise is known to be stolen, should not be permitted to claim a legitimate Fourth Amendment interest in that property when it is seized. They can reasonably anticipate that efforts will be made by the authorities to apprehend the goods to return them to the rightful owners; thus, their "possession" does not alone warrant "a reasonable expectation of freedom from governmental intrusion" (*Mancusi* v. *DeForte*, *supra*, 392 U.S. at 368). The mere fact of prior or constructively contemporaneous possession, if "wrongful," deserves no greater protection under the Fourth Amendment than is accorded to mere "presence" alone, when it is "wrongful." Plainly a trespasser who has hidden stolen goods on a stranger's

premises, should not, simply by virtue of his claimed interest in the hidden property, be allowed to stand in the same shoes as one "legitimately on premises where a search occurs" (*Jones, supra*, 362 U.S. at 267) for purposes of challenging the search and seizure.

This, of course, is not to say that whenever stolen property is seized, the possessor thereof has no standing to complain. If the seizure takes place in his home or office, for example, or on the premises of another when he is rightfully present, he would have standing to move to suppress. The same would be true if the stolen goods were obtained as a result of an unwarranted search of his person. But the thief who secretes property he has stolen in an open field, or, as here, on someone else's premises in which he has no Fourth Amendment interest, suffers no infringement of any legitimate expectation of privacy at the time that the property is seized, and "[n]o valuable social purpose could conceivably be served by extending [to him] the protection of the Fourth Amendment * * *." *Palmer* v. *State of Maryland*, 286 A. 2d 572 (Md. Ct. of Spec. App.). See also *United States* v. *Sacco*, 436 F.2d 780 (C.A. 2), certiorari denied, 404 U.S. 834.[20]

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[20] *United States* v. *Jeffers*, 342 U.S. 48, does not point in the opposite direction. That case involved the seizure of heroin from the hotel room of the defendant's aunts. Standing was recognized because the defendant had permission to use the room at will and thus had a lawful interest in the premises. See *Mancusi* v. *DeForte, supra*, 392 U.S. at 368. While the Court also added that the seized narcotics could be treated as "being [defendant's] property, for purposes of the exclusion-

The deterrent impact of the exclusionary rule is not diminished by denying a thief "standing" in such circumstances.[21] The fact that the thief's earlier possession or constructive possession of the stolen goods is entitled to no independent protection under the Fourth Amendment does not encourage law enforcement officers to be any less circumspect in their respect for legitimate expectations of privacy of the person or premises. And, without some actual invasion of the thief's personal privacy, there is no more reason to accord standing than there is when other evidence is seized from third parties that, under present law, can be introduced against persons whose privacy has not been invaded. See *Alderman* v. *United States*, *supra*, 394 U.S. at 171-172, 175.[22] See also,

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ary rule * * *" (342 U.S. at 54), that observation does not apply here where stolen property, rather than contraband is involved. See, also, the Court's discussion of standing based on an interest in the premises searched rather than in the property seized, in *Alderman* v. *United States*, *supra*, 394 U.S. at 177, n. 10.

[21] See generally Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. Chi. L. Rev. 665 (1970); and see *Bivens* v. *Six Unknown Named Agents of the Federal Bureau of Narcotics*, *supra*, 403 U.S. at 415-418 (Burger, C. J., dissenting).

[22] In *Alderman*, the Court rejected an argument by the defendant that the rules of standing should be liberalized as a means of increasing the deterrent function of the exclusionary rule (see, *e.g.*, *Elkins* v. *United States*, 364 U.S. 206; *Linkletter* v. *Walker*, 381 U.S. 618, 636-637). The Court stated (394 U.S. at 174-175) that it was "not convinced that the additional benefits of extending the exclusionary rule to other defendants would justify further encroachment upon

Parman v. *United States*, 399 F.2d 559, 564-565 (C.A.D.C.), certiorari denied, 393 U.S. 858; *Feguer* v. *United States*, 302 F.2d 214, 248-250 (C.A. 8), certiorari denied, 371 U.S. 872.[22] Cf. *Klingler* v. *United States*, 409 F.2d 299, 304-305 (C.A. 8), certiorari denied, 396 U.S. 859.

For these reasons, the courts below properly refused to recognize that petitioners had a sufficient interest under the Fourth Amendment to challenge the use against them of the stolen merchandise seized at Knuckles' general store.

B. Petitioners Are Not Entitled to Automatic Standing Under *Jones* v. *United States*, 362 U.S. 257, Simply Because Possession of the Seized Property At An Earlier Time Was an Element of the Offense

Petitioners also appear to make the claim that, irrespective of the absence of any interference with

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the public interest in prosecuting those accused of crime and having them acquitted or convicted on the basis of all the evidence which exposes the truth." See, also, *Lego* v. *Twomey*, 404 U.S. 477, 487-489.

[22] These cases rejected the argument that, in order to effectuate the deterrent function of the exclusionary rule, evidence seized by law enforcement authorities from abandoned premises should be suppressed where the officers did not know at the time of their search and seizure that an abandonment had occurred, and the search would have been illegal but for that fact. Since the defendants' privacy had not been invaded, the courts found no occasion to exclude the evidence merely to attempt to deter a repetition of the same type of conduct by the officers. And see *Massachusetts* v. *Painten*, 389 U.S. 560, 564-565 (White, J., joined by Stewart and Harlan, JJ., dissenting from the dismissal of certiorari as improvidently granted).

their personal rights, they are automatically entitled to standing to challenge the search and seizure under *Jones* v. *United States*, *supra* (Pet. Br. 12-13). It is argued that because count 2 of the indictment charges that petitioners "did transport * * * [in interstate commerce] * * * stolen goods, wares and merchandise * * *" (App. 10), thereby requiring the government to prove, *inter alia*, "possession" to convict, petitioners fit within the automatic-standing rule created in *Jones*. We believe it is unnecessary for the Court to determine whether the substantive count here—interstate transportation of stolen property—charges a "possessory" offense within the meaning of *Jones*.[24] Neither the rationale of that decision

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[24] In *Jones*, the defendant was charged with narcotics offenses (21 U.S.C. (1964 ed.) 174, 26 U.S.C. (1964 ed.) 4704(a)) which, because of statutory presumptions, permitted conviction upon proof of knowing possession alone. The Third Circuit initially read the decision as permitting an application of the automatic-standing rule only where "possession" is alone sufficient to convict. See *United States* v. *Konigsberg*, 336 F. 2d 844, 847 (C.A. 3), certiorari denied, 379 U.S. 933.

The First and Tenth Circuits, however, disagreed, and held the rule to be applicable even when "possession" is but one element of the offense charged. See *Niro* v. *United States*, 388 F. 2d 535, 537 (C.A. 1); *Simpson* v. *United States*, 346 F. 2d 291, 295 (C.A. 10). This conflict was for most courts of appeals deemed settled by the dicta of this Court in *Simmons* v. *United States*, *supra*, 390 U.S. at 390, summarizing *Jones* as indicating "that * * * when * * * possession of the seized evidence is itself *an essential element of the offense* * * * charged, the Government is precluded from denying that the defendant has the requisite possessory interest to challenge the admission of the evidence" (emphasis supplied).

Since *Simmons*, the *Konigsberg* interpretation of the *Jones* decision has in effect been abandoned in favor of the position

insofar as it concerns possession as a basis for standing, nor the fundamental purpose of the Fourth Amendment as a protection of individual privacy, supports an application of the *Jones* automatic-standing rule in the circumstances of this case.

1. The Court's focus in *Jones* on the "possessory" nature of the offense charged as a basis for determining "standing" to challenge a search and seizure rests on two policies that in the present context bear only remotely on the "privacy" considerations normally associated with the Fourth Amendment.[25]

On the one hand, the automatic-standing rule was

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taken in *Niro* and *Simpson*, not only in the Third Circuit (*United States* v. *West*, 453 F. 2d 1351) but in most other courts of appeals that have considered the question. See, *e.g.*, *United States* v. *Price*, 447 F. 2d 23, 28-29 (C.A. 2); *United States* v. *Cobb*, 432 F. 2d 716, 719-722 (C.A. 4); *Glisson* v. *United States*, 406 F. 2d 423, 425-426 (C.A. 5); *Colosimo* v. *Perini*, 415 F. 2d 804 (C.A. 6); *United States* v. *Allsenberrie*, 424 F. 2d 1209, 1213-1214 (C.A. 7). See also *Baker* v. *United States*, 401 F. 2d 958, 982 (C.A. D.C.) (dictum); *Kuhl* v. *United States*, 370 F. 2d 20, 34-36 (C.A. 9) (*en banc*; opinion of four judges dissenting).

[25] *Jones* involved the execution of a search warrant directed to an apartment in which the defendant, who was present during the search, had no interest greater than an invitee or guest. The Court conferred "standing" not only on the basis of the possessory charge in the indictment—which is the aspect of the decision presently under consideration—but also on the ground that "anyone legitimately on premises where a search occurs may challenge its legality by way of a motion to suppress, when its fruits are proposed to be used against him" (362 U.S. at 267). This latter ruling is not involved in the present case (see pp. 4-5, 19-20, *supra*), and we do not question here its essential soundness. See *Mancusi* v. *DeForte*, *supra*.

formulated so that a defendant, who was charged with a crime involving possession and desired to vindicate his Fourth Amendment claim, would not be "forced to allege facts the proof of which would tend, if indeed not be sufficient, to convict him" (362 U.S. at 262). The so-called "dilemma" (*ibid.*) that the Court sought to eliminate by its new rule was described by Mr. Justice Frankfurter in the following terms (*ibid.*):

> At the least, such a defendant has been placed in the criminally tendentious position of explaining his possession of the premises. He has been faced, not only with the chance that the allegations made on the motion to suppress may be used against him at the trial, although that they may is by no means an inevitable holding, but also with the encouragement that he perjure himself if he seeks to establish "standing" while maintaining a defense to the charge of possession.

In addition, the Court stated (362 U.S. at 263): "* * * we are persuaded by this consideration: to hold to the contrary, that is, to hold that [the defendant's] failure to acknowledge interest in the narcotics or the premises prevented his attack upon the search, would be to permit the Government to have the advantage of contradictory positions as a basis for conviction." Expanding on this theme, the Court reasoned (362 U.S. at 263-264):

> [The defendant's] conviction flows from his possession of the narcotics at the time of the search. Yet the fruits of that search, upon which the

> conviction depends, were admitted into evidence on the ground that [defendant] did not have possession of the narcotics at that time. The prosecution here thus subjected the defendant to the penalties meted out to one in lawless possession while refusing him the remedies designed for one in that situation. It is not consonant with the amenities, to put it mildly, of the administration of criminal justice to sanction such squarely contradictory assertions of power by the Government. The possession on the basis of which [defendant] is to be and was convicted suffices to give him standing under any fair and rational conception of the requirement of Rule 41(e) [Fed.R.Crim.P.].[28]

2. With regard first to the "dilemma" rationale sustaining the automatic-standing rule of *Jones*, the "special problem" (362 U.S. at 261) then confronting defendants with Fourth Amendment claims that prompted a relaxation of conventional standing requirements for possessory offenses has, we submit, largely been dissipated in view of this Court's later ruling in *Simmons* v. *United States*, *supra*.

Simmons involved a conviction of two defendants, Simmons and Garrett, for the armed robbery of a federally insured savings and loan association (18

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[28] We earlier noted that Rule 41(e), Fed.R.Crim.P., is "a statutory direction governing the suppression of evidence acquired in violation of the conditions validating a search" (*Jones* v. *United States*, *supra*, 362 U.S. at 260). As this Court pointed out in *Alderman* v. *United States*, *supra*, 394 U.S. at 178, n. 6: "*Jones* thus makes clear that Rule 41 conforms to the general standard and is no broader than the constitutional rule."

U.S.C. 2113). The Court was called upon to decide whether the government had been properly permitted as part of its case in chief to use against Garrett testimony that he had previously given on his unsuccessful motion to suppress evidence on grounds of illegal search and seizure. The evidence seized included several coin cards and money wrappers from the bank that had been robbed; these items were found by federal agents in a suitcase during a search of someone else's house. The Court stated that Garrett had justifiably assumed that he had to meet the standing requirements affirmatively in order to challenge the use of the items against him; to meet this burden Garrett had tried to establish standing by testifying to ownership of the suitcase (390 U.S. at 381, 390).[27]

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[27] *Simmons* implicitly raises the question whether *Jones* should properly be understood as extending beyond cases where possession alone is sufficient to convict, as under the narcotics laws. In the present case, possession (at some time, but not necessarily at the time of seizure) of stolen property is, as we have conceded, a necessary factual element of the offense of interstate transportation of stolen property. But bank robbery, the crime involved in *Simmons* [illegible], also requires proof of possession, since the crime consists of forcibly taking "any property or money or any other thing of value" from a bank. 18 U.S.C. 2113(a). Yet in *Simmons* the Court clearly regarded *Jones* as not according Garrett automatic standing to challenge the legality of the seizure of the stolen loot. On the contrary, the basis for the Court's decision was that Garrett had to establish that his personal rights were involved in the search for and seizure of the evidence, and that as a practical matter it was necessary for him to testify to this factual predicate for standing. Compare the cases discussed in n. 24, *supra*.

In that context, the Court held that Garrett's suppression testimony was inadmissible against him at trial (390 U.S. at 394). If the earlier testimony were available to the prosecution for later use, the Court reasoned (390 U.S. at 392-393), this might well deter some defendants "from presenting the testimonial proof of standing necessary to assert a Fourth Amendment claim." And, as recently explained in *McGautha* v. *California*, 402 U.S. 183, 211-213, wherein the rationale of *Simmons* was reexamined, such a deterrence in this area could thus have the effect of "weakening the efficacy of the exclusionary rule as a sanction for unlawful police behavior." "This," the Court observed (402 U.S. at 211), "was surely an analytically sufficient basis" for the use-restriction rule that emerged in *Simmons*.[28]

In light of *Simmons*, defendants wishing to vindicate their Fourth Amendment rights need no longer be concerned about the dilemma which in part underlay the automatic-standing rule of Jones. They

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[28] The Court in *Simmons* also indicated that a use-restriction rule of this sort was necessary to avoid the "intolerable" situation of a defendant being forced to choose between giving up "what he believed * * * to be a valid Fourth Amendment claim, or, in legal effect, to waive his Fifth Amendment privilege against self-incrimination" at trial (390 U.S. at 394). But, in *McGautha* (402 U.S. at 212), the Court stated that the validity of such reasoning, "based on a 'tension' between constitutional rights and the policies behind them * * * must now be regarded as open to question." It did not, however, question the soundness of the result in *Simmons* (402 U.S. at 212).

can now come forward on a motion to suppress and affirmatively demonstrate that the challenged search and seizure implicated their personal, constitutionally protected interests, without fear of jeopardizing their defense at trial on the charge of committing a "possessory" crime. Cf. *United States* v. *Cobb*, *supra*, 432 F. 2d at 721-722.[20]

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[20] It is unclear whether the rule in *Simmons* is limited to the *direct* use at trial of the defendant's earlier testimony, or also bars the introduction of prior contradictory statements for purposes of impeachment only. In *Harris* v. *New York* 401 U.S. 222, the Court, in a different context, held that the use-restriction rule for in-custody statements under *Miranda* v. *Arizona*, 384 U.S. 436, did not preclude the prosecution from using such statements to impeach (401 U.S. at 226). *Harris* was concerned with a use-restriction rule grounded on the policy of deterring unlawful police behavior during custodial interrogation; and it was there determined (401 U.S. at 225) that "sufficient deterrence flows when the evidence in question is made unavailable to the prosecution in its case in chief." *Simmons*, on the other hand, established a use-restriction rule, as we have pointed out, grounded on a different consideration, *i.e.*, so that defendants will not "be deterred from presenting the testimonial proof of standing necessary to assert a Fourth Amendment claim" (390 U.S. at 392-393). In this context, it is a difficult question whether such "deterrence" is reduced enough by assuring a defendant that his prior testimony cannot be used against him at trial *directly* to permit its *indirect* use by the government for impeachment purposes. But that question is not presented in this case.

We point out, however, that if the *Harris* holding can appropriately be extended to the use-restriction rule of *Simmons*, such a result would not resurrect for the defendant the type of "dilemma" that concerned the Court in *Jones*. The prospect that earlier testimony on the motion to suppress might be used at trial for impeachment purposes is, we submit, legitimate cause for concern only if the defendant intends to

3. If, then, the automatic-standing concept of *Jones* continues to have vitality, it must be found in the alternative basis advanced, *i.e.*, that "to hold to the contrary, that is, to hold that [the defendant's] failure to acknowledge interest in the [seized property] or the premises prevented his attack upon the search, would be to permit the Government to have the advantage of contradictory positions as a basis for conviction" (362 U.S. at 263). This reasoning, however, while perhaps valid in other contexts where the defendant is charged with illegal possession at the time of the search, does not sustain an application of the *Jones* rule in the particular circumstances of this case.

a. Unlike *Jones*, where the only evidence of the defendant's unlawful "possession" was at the time of the seizure of the contraband that he sought to suppress, the petitioners here, as we earlier stated (*supra*, pp. 20-24), were not in possession of the stolen merchandise at the time of its seizure. They had parted with possession when they delivered the goods to

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"use perjury by way of a defense" (*Harris* v. *New York*, *supra*, 401 U.S. at 226). His "dilemma" thus does not rest on the fact that, if he tells the truth at the suppression hearing, he virtually confesses his guilt of the offense. It is, rather, that if he speaks truthfully on one occasion, he cannot make contradictory statements on the other. But any time a person testifies under oath he is "under an obligation to speak truthfully and accurately" (*Harris* v. *New York*, *supra*, 401 U.S. at 225). Accordingly, it would seem particularly inappropriate to relax the requirements for standing to suppress simply to "free [the defendant] from the risk of confrontation with prior inconsistent utterances" (*id.* at 226).

Knuckles, which was between two and three months before the contested seizure occurred. Indeed, the indictment itself charged that petitioners "did transport" the stolen merchandise not later than August 28, the day before the search. Thus, the indictment contemplated proof of "possession" prior to, rather than coincident with, the challenged search and seizure. Where an unlawful search occurs sometime after a defendant has parted with possession of the property seized, at a place in which he has no interest, and at a time when he is not present, the alternative rationale of *Jones* is inapplicable. There is no "contradiction" in government positions to deny that the defendant has a sufficient possessory interest at the time of the search and seizure to challenge them and also to allege at trial that he had possession of the seized property at some earlier time.

We think this is clear from *Jones* itself, where the court explained that in contesting the sufficiency of the defendant's "possession" for standing purposes, the government was in a sense contradicting the indictment, since the defendant's guilt, as charged, "flows from his possession of the narcotics *at the time of the search.*" 362 U.S. at 263; emphasis added.

This reading is also confirmed by the Court's subsequent decision in *Wong Sun* v. *United States, supra.* The Court there held that heroin seized in violation of a defendant's Fourth Amendment rights was not admissible against him. But it also ruled that the heroin was admissible against his co-defendant Wong Sun, who had originally supplied the drugs, even

though proof of that earlier possession was sufficient without more to convict (371 U.S. at 477). Since the heroin had been seized from someone else's premises after Wong Sun had transferred it, there was "no right of privacy * * * or premises which would entitle Wong Sun to object to its use * * *" (371 U.S. at 492). As we observed earlier, the Court explicitly noted that, despite the critical importance of the showing of possession: "This case is not like *Jones* v. *United States*, 362 U.S. 257, where the person challenging the seizure of evidence was lawfully on the premises at the time of the search." 371 U.S. at 492, n. 18. See, also, *United States* v. *Wells*, *supra*, 437 F. 2d at 1146; *United States* v. *Lopez*, *supra*, 420 F. 2d at 313, 316.[*]

Finally, the decision last Term in *Combs* v. *United States*, 408 U.S. 224, seems to preclude any justifiable reliance on *Jones* here. In *Combs* the defendant was charged with knowingly receiving, possessing, and concealing stolen property, in violation of 18 U.S.C. 659. The stolen goods were ultimately seized in a shed on the property of the defendant's father (a co-defendant) where they had earlier been stored; the defendant did not live on the property and was not present when the search took place. The issue was whether the defendant had standing to challenge

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[*] But see *United States* v. *Price*, 447 F. 2d 23 (C.A. 2), where the Second Circuit—in our view erroneously—applied the automatic-standing rule of *Jones* despite the fact that the defendant had relinquished all control over the seized goods before the search and seizure occurred. *Price* was followed in *United States* v. *Pastore*, 456 F. 2d 99 (C.A. 2).

the lawfulness of the seizure. This Court did not consider the defendant to be automatically entitled to standing under *Jones* merely because he was charged with illegal possession of the stolen property *prior* to the search; on the contrary, the Court remanded the case to the district court for a determination whether in fact the defendant "had an interest in connection with the searched premises that gave rise to 'a reasonable expectation [on his part] of freedom from governmental intrusion' upon those premises. *Mancusi* v. *DeForte*, 302 U.S. 364, 368 (1968)." 408 U.S. at 227; footnote omitted. In the present case, the facts have been fully developed, and petitioners neither have, nor claim to have, any cognizable interest in the store where the seizure was made.

b. Moreover, even if, as petitioners urge (Pet. Br. 9-11), this could be considered, under some legal fiction, a case of "contemporaneous possession," the government still would not benefit from what the Court in *Jones* called "contradictory assertions of power" (362 U.S. at 264). The "possession" in this case relates solely to *stolen* merchandise in which, as we have shown, petitioners have no legitimate Fourth Amendment interest. It is, therefore, not necessary for the government to refute such "possession" on the motion to suppress, since it is the lack of a sufficient constitutional interest that is the basis for opposing standing, and the presence or absence of "possession" of stolen property is not germane. There is plainly no inconsistency in the government's asserting before the jury on the issue of guilt that pe-

titioners had possession of the stolen property at the time that it was seized, while requiring petitioners, on a motion to suppress, to establish that some legitimate expectation of privacy on their part, irrespective of such "possession," was invaded by the search and seizure.

In such circumstances, the prosecution does not, as *Jones* suggested (362 U.S. at 263), subject petitioners "to the penalties meted out to one in lawless possession while refusing [them] the remedies designed for one in that situation." The "remedies" under the exclusionary rule depend upon some transgression of the constitutional right to individual privacy. As we have shown, they should not be accorded automatically to one charged with "lawless possession" when the sole basis for his claim of prejudice is the seizure of stolen property in which he has no proprietary interest and with respect to which he can have no reasonable expectation of privacy under the Fourth Amendment. See *Alderman* v. *United States*, *supra*, 394 U.S. at 179, n. 11.

II. THE IMPROPER ADMISSION UNDER *BRUTON* v. *UNITED STATES*, 391 U.S. 123, OF PETITIONERS' CROSS-INCULPATORY STATEMENTS WAS IN THIS CASE HARMLESS ERROR BEYOND A REASONABLE DOUBT

As set forth in our Statement (*supra*, pp. 7-12), both county detective Hulgin and F.B.I. agent Whitley testified at petitioners' trial concerning statements made to them by each petitioner following his arrest and after being properly advised of his constitutional rights. Much of this testimony was, as we have

already indicated, admitted without objection; however, petitioners did object to the admission of those portions of the recounted statements in which one of them implicated the other, relying on *Bruton* v. *United States*, 391 U.S. 123. The cross-inculpatory statements were admitted by the district court over petitioners' objection (see pp. 10-12, *supra*).

The court of appeals determined that the admission of the challenged statements violated the principle of *Bruton* and thus was error (App. 246). But "[not] all trial errors which violate the Constitution automatically require reversal." *Chapman* v. *California*, 386 U.S. 18, 23. This Court has twice declined to overturn convictions where certain evidence was admitted at trial in violation of *Bruton* on the ground that the error, when viewed in light of all the other evidence properly before the jury, was harmless beyond a reasonable doubt. See *Harrington* v. *California*, 395 U.S. 250; *Schneble* v. *Florida*, 405 U.S. 427. The court below correctly applied that principle here.

As the Statement clearly shows (*supra*, pp. 6-10) the independent evidence in this case established, to use the words of the court of appeals (App. 245), "the classical open-and-shut case." A slip of paper dropped by petitioner Brown, listing in Brown's handwriting items of merchandise together with suspiciously discounted prices, prompted a police surveillance of Central Jobbing Company's warehouse, where both petitioners were employed and from which substantial amounts of merchandise had been stolen.

Petitioners were observed by the police removing cartons of merchandise from the warehouse after closing hour and loading them onto a U-Haul van truck. (Some twenty photographs taken of petitioners in the process of stealing the merchandise were admitted into evidence at the trial.) Petitioners were arrested as they started to drive away with the stolen merchandise. After being advised of their constitutional rights, both petitioners confessed to having stolen goods from the warehouse previously and to having transported them by truck to Knuckles' store in Manchester, Kentucky (App. 128-129, 146-147). This led the police to Knuckles' store where they discovered merchandise belonging to Central Jobbing Company worth approximately $100,000. The seizure of this evidence corroborated each petitioner's confession. Five eyewitnesses placed both petitioners at Knuckles' store late one night in June 1970; they were seen unloading from a U-Haul truck some cartons like those stolen from Central Jobbing Company. Other independent evidence showed that petitioner Brown had rented a U-Haul truck twice in June 1970, and on both occasions the truck, when returned, showed approximately the mileage of the roundtrip distance between Cincinnati, Ohio (where the warehouse was located) and Manchester, Kentucky. This evidence was not disputed, nor was there any contradictory evidence in the case.

The testimony to which petitioners' objected involved those portions of their statements to the authorities in which each had implicated the other as

accompanying him on the previous trips to Knuckles' store. Also involved were statements by Smith that he had been approached by Brown about engaging in the thefts (App. 143), and that Brown had prepared lists of the merchandise to be stolen (App. 137-141). An objection was also made to testimony about the amount of money that the non-declarant had received from Knuckles for their joint efforts (App. 134-135).

As in *Harrington* and *Schneble*, however, each petitioner had himself admitted his involvement in the crime (App. 128-129, 146-147, 220-221). Moreover, the fact that petitioners were together during the prior thefts was established directly by eye-witness testimony concerning their activities at Knuckles' store. They were arrested together while admittedly attempting another delivery of stolen merchandise to Knuckles. And each petitioner admitted he had been paid by Knuckles for the stolen merchandise. Thus, the challenged *Bruton* references were merely cumulative. See *Harrington* v. *California*, *supra*, 395 U.S. at 254.

On this record, therefore, the court below properly determined that admission of the challenged testimony was harmless error. The independent evidence here so overwhelmingly established petitioners' guilt that "'the minds of an average jury'" could not have found the government's case appreciably less persuasive had the cross-inculpatory statements been excluded. See *Schneble* v. *Florida*, *supra*, 405 U.S. at 432.[11]

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[11] The present case is, in this respect, even stronger than *Schneble*. In *Schneble*, the independent evidence consisted

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the court of appeals should be affirmed.

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primarily of the defendant's own confession, the voluntariness of which was itself a fact question for the jury. See Mr. Justice Marshall's dissent in *Schneble* (405 U.S. at 432-437). Here, by contrast, petitioners' own confessions comprise but a part of the independent evidence. Moreover, as we have stated, petitioners were admittedly advised of their constitutional rights before making any statements to the authorities; there is no controversy here over the fact that their confessions were voluntary and otherwise admissible under *Miranda* v. *Arizona*, 384 U.S. 436.

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